83-6625

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LEONARD MARVIN LAWS,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE MISSOURI SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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I N D E X

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

STATEMENT OF THE CASE

Petitioner Leonard Marvin Laws was convicted of two counts of capital murder, § 565.001, RSMo 1978, and received two sentences of death for the murder of an elderly couple, Clarence and Lottie Williams, committed for the purpose of stealing their car and household possessions. The facts relating to this offense are fully set out in the opinion of the Supreme Court of Missouri affirming petitioner's conviction and sentence, State v. Laws, 661 S.W.2d 526, 528-529 (Mo. banc 1983), and will not be restated here.

The facts and circumstances bearing upon petitioner's present claim are as follows: under § 565.006.2, RSMo 1979 Supp., "[o]nly such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible" in the punishment phase of a bifurcated capital trial. On May 13, 1981, three months after petitioner had been charged by indictment with the above two counts of capital murder, the state filed and served upon petitioner its Notice of Evidence in Aggravation (Petitioner's Appendix, hereinafter "Pet.App.," E-2). A notice of additional aggravating evidence was filed on September 4, 1981, (Pet. App. E-3). After these notices had been filed, it was discovered that the indictment issued against petitioner was technically defective in that it failed to allege an essential element of capital murder, that the killings were committed with deliberation. See State v. Gilmore, 650 S.W.2d 627 (Mo. banc 1983). As a result, a second indictment was obtained against petitioner on February 9, 1982, alleging exactly the same offenses and including the word "deliberately" (Pet.App. E-4). Following this indictment, petitioner made no claim that the previous notices of aggravating evidence were somehow invalid because of the dismissal of the original indictment. To the contrary, he filed a Motion to Strike the State's Notice of Evidence in

Aggravation three days before trial in which he addressed the contents of the state's notices and claimed that they were insufficiently specific under § 565.006.2 (Pet.App. E-8).

At no time during petitioner's trial, or in the Motion for New Trial filed after his conviction, was it contended that the state's notices of evidence in aggravation were rendered invalid because of the subsequent filing of a second indictment against petitioner. When this theory was advanced for the first time on appeal before the Supreme Court of Missouri, petitioner's argument was that the notices were "nullities" and thus failed to comply with § 565.006.2 because of the defective indictment, and not that petitioner's federal constitutional rights were violated in any fashion. Accordingly, petitioner's current "equal protection" theory has never been presented to any Missouri court.

ARGUMENT

Petitioner's claim is that he received no pretrial notice of the evidence to be submitted in aggravation of the offense during the punishment phase of trial, in violation of § 565.006.2, RSMo 1979 Supp., and that this violated his Fourteenth Amendment right to equal protection of the laws. An initial difficulty with this theory is that it was never presented to any state court.[1] As this Court has observed,

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system" (citations omitted). Webb v. Webb, 451 U.S. 493, 496-497 (1981).

See also Sandstrom v. Montana, 442 U.S. 510, 527 (1979).

In any event, petitioner's theory is both factually and legally bankrupt. It is preposterous for petitioner to assert that he had "no notice" of the aggravating evidence to be introduced at the punishment phase of trial when he did in fact have such notice and evidenced his full awareness of this fact by filing a challenge to its legal sufficiency three days before trial. As the Missouri Supreme Court pointed out,

> "The purpose of the notice of aggravating circumstances is just what the title implies -- to give notice. Defense counsel, by moving to strike the notice which was filed, show that they were aware of the claimed aggravating circumstances." State v. Laws, 661 S.W.2d 526, 531 (Mo. banc 1983).

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[1] Although this could be demonstrated by production of the state court records and briefs, it is also manifest from the fact that the present theory was not addressed in the opinion of the Missouri Supreme Court. Where "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary" (citations omitted). Street v. New York, 394 U.S. 576, 582 (1969).

Even ignoring this fact, respondent is mystified as to the attempted application of the Equal Protection Clause to the claim at bar. *Petitioner has not even attempted to allege* that the purported "absence" of notice was the result of invidious discrimination on the basis of race, sex, national origin, indigency, or any other category, "suspect" or otherwise -- rather, he simply states that he did not receive a proper notice. Such an assertion clearly fails to state any "equal protection" violation. See Mlikotin v. City of Los Angeles, 643 F.2d 652, 653 (9th Cir. 1981) for similar facts. For these reasons, the petition at bar presents no issue worthy of review by this Court.

CONCLUSION

In view of the foregoing, the respondent submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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